NO. 74-666

In the Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
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THE TEWA TESUQUE, et al,

Petitioners

v.

ROGERS C.B. MORTON, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	3
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	23

TABLE OF AUTHORITIES

Cases:

Association of Data Processing Service Organizations v. Camp 397 U.S. 150 (1970) 11

Barr v. Matteo
360 U.S. 564 (1959) 22

Carter v. Seamans
411 F. 2d 767 (5th Cir. 1969) 18

Cheyenne River Sioux Tribe of Indians v. United States
338 F. 2d 906 (8th Cir. 1964), cert. den. 382 U.S. 815 (1965) 14

Chavez v. Kelly
364 F. 2d 113 (10th Cir. 1966) 20

Citizens to Preserve Overton Park, Inc. v. Volpe
401 U.S. 402 (1971) 11

Davis v. Morton
469 F. 2d 593 (10th Cir. 1972) 6, 15, 20, 22, 23

De Funis v Odegaard
U.S. , 94 S. Ct. 1704 (1974) 23

Doe v. McMillan
412 U.S. 306 (1973) 21, 22

Dugan v. Rank
372 U.S. 609 (1963) 17, 18, 19

Franklin v. Meredith
386 F. 2d 958 (10th Cir. 1967) 18

Heckman v. United States
224 U.S. 413 (1912) 13

Larson v. Domestic and Foreign Commerce Corp.
337 U.S. 682 (1949) 17, 18, 19, 21

National Licorice Co. v. National Labor Relations Board
309 U.S. 350 (1940) 14

Natural Resources Defense Council v. T.V.A.
340 F. Supp. 400 (S.D.N.Y. 1971), rev. on other grounds,
459 F. 2d 255 (2nd Cir. 1972) 15

Norvell v. Sangre de Cristo Development Co.
Civ. No. 9106, 372 F. Supp. 348, (D. N.M. 1974) ... 15, 20

O'Bryan v. Chandler
352 F. 2d 987 (10th Cir. 1965) 18

Ohio Bell Telephone Co. v. Public Utilities Commission
301 U.S. 292 (1937) 20

Pan American Petroleum Corp. v. Udall
192 F. Supp. 626 (D. D.C. 1961) 14

Powell v. McCormack
395 U.S. 486 (1969) 22

Preble v. Johnson
275 F. 2d 275 (10th Cir. 1960) 20

Provident Tradesmens Bank and Trust Co. v. Patterson
390 U.S. 102 (1968) 13, 16, 17

Pueblo of Picuris v. Abeyta
50 F. 2d 12 (10th Cir. 1937) 14

Sierra Club v. Morton
405 U.S. 727 (1972) 11

Sowders v. Damron
457 F. 2d 1182 (10th Cir. 1972) 20

State of Washington v. Udall
417 F. 2d 1310 (9th Cir. 1969) 18

Tooahnippah v. Hickel
397 U.S. 598 (1970) 12

U.S. v. Ahtanum Irrigation District
236 F. 2d 321 (9th Cir. 1956), cert. den. 352 U.S. 988; 330 F. 2d 897 (9th Cir. 1956); 338 F. 2d 307 (9th Cir. 1964); cert. den. 381 U.S. 924. 23

U.S. v. SCRAP
412 U.S. 669 (1973) 11, 18

United States Constitution

First Amendment 4, 6, 11

Fifth Amendment 4, 6, 11

Federal Statutes

5 U.S.C. § 701-706 (Administrative Procedure Act) 4, 5, 9, 11

25 U.S.C. § 1 ..... 4, 11
" § 1 (a) 4, 11
" § 2 ..... 4, 11
" § 2 (a) 4, 11
" § 9 ..... 4, 11
" § 81 ..... 4, 11, 19
" § 415 ..... 4, 5, 11, 19, 22, 23
" § 621 ..... 4, 11

28 U.S.C. Rule 19 ..... 4, 11, 12, 13, 14, 15, 16, 17

28 U.S.C. § 1331 (general federal question jurisdiction). 5
" § 1343 (civil rights juridsiction) 5
" § 1361 (mandamus Jurisdiction) 5

42 U.S.C. § 1985 .....11, 19
" § 1988 .....11, 19
" §§ 4321-4347 (National Environmental Policy Act) 4, 11, 19, 20, 21, 22, 23

New Mexico Statutes

N.M. Stat. Ann. 40A-8-1 (1953) 4, 19

Federal Regulations

25 CFR §§ 131.5, 131.6, 131.7 (1970) 4, 11

Miscellaneous

Advisory Committee Note to Amended Rule 19, 28 U.S.C. Rule 19.....4, 16

No.

OCTOBER TERM, 1974

THE TEWA TESUQUE, et al., Petitioners,

-vs-

ROGERS C.B. MORTON, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered August 5, 1974, affiriming the dismissal of their Complaint by the United States District Court for the District of New Mexico.

OPINIONS BELOW

The opinion of the United States District Court (App. A, **infra**.) is reported at 360 F. Supp. 452. The opinion of the United States Court of Appeals for the Tenth Circuit (App. B., **infra**.) is reported at 498 F. 2d 240.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1974. A timely petition for rehearing **en banc** was

denied on August 5, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The plaintiffs-petitioners are: THE TEWA TESUQUE, an unincorporated association, JOE D. PINO, MARCUS VIGIL, EVA MITCHELL, LORENCITA PINO, JOHN MORA, JOHN VIGIL, SUSIE DORAME, IGNACIA DURAN, BEA REYNOLDS, SHIRLEY DURAN, JOE A. DURAN, ELOY HERRERA, CARMELITA HERRERA, VIVIAN HERRERA, PRISCILLA VIGIL, GILBERT VIGIL, VICKI VIGIL, MARGARET VIGIL, BOB MOQUINO, MARY MOQUINO, MILLER E. VIGIL, ANASTACIA PINO, EUSEVIA PADILLA, MARIA C. HERRERA, VASELLIO HERRERA, BERTHA VIGIL, REYES DURAN, STELLA DURAN, MARZELLA LEAF, MILTON HERRERA, MARSHA LEAF, CINDY HERRERA, GARY MOQUINO, CONNIE MOQUINO, ELMER VIGIL, LORRAINE VIGIL, DONNA HERRERA, CLIFFORD MOQUINO, YVONNE C. VIGIL, CORWIN VIGIL, DONNA MITCHELL, ARNOLD MITCHELL, JAMES F. DURAN, A. ADAM DURAN, RANDY MOQUINO, DENISE L. DORAME, VIRGIE DURAN, CECILIA ENOS, LEONARD ENOS, MARK MITCHELL.

The defendants-respondents are: ROGERS C.B. MORTON, individually and as Secretary of the Interior of the United States; LOUIS R. BRUCE, individually and as the Commissioner of the Bureau of Indian Affairs; WALTER O. OLSON, individually and as the Albuquerque Area Director of the Bureau of Indian Affairs; ROBERT FRIEDMAN, individually and as Superintendent of the Northern Pueblos Agency of the Bureau of Indian Affairs; JOSEPH KINGSOLVER, individually

and as the Bureau of Indian Affairs co-ordinator for the Tesuque Pueblo or Tribe of Indians, and the SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

QUESTIONS PRESENTED

1. Whether judicial review of agency action, otherwise reviewable, is unavailable to members of an Indian tribe who allege injury as individuals, and may be sought only by tribal government.

2. Whether the 10th Circuit erred in denying review under the Administrative Procedure Act, where there was no statutory prohibition to judicial review; the action challenged was not committed to agency discretion by law and plaintiffs had alleged "injury in fact" to interests arguably "within the zone of interests" to be protected by the statute which the defendants allegedly violated.

3. Whether the 10th Circuit erred in concluding that Tesuque Pueblo is an "indispensable party" in whose absence plaintiffs' action should be dismissed where:

(1) the rights asserted by plaintiffs are rights which "arise independently of" and are "distinct and separate" from the provisions of the lease to which the Pueblo is a party;

(2) the defense of indispensability of the Tesuque Tribe was raised without success by the same defendants in two related actions arising out of the identical lease;

(3) any interests of the Tribe adverse to that of the plaintiffs will be adequately represented by the U.S. Department of Justice, as a matter of law; and

(4) there was no evidence in the record to support the Court's factual determinations under Rule 19 (b), Federal Rules of Civil Procedure.

4. Whether the 10th Circuit erred in reaching the merits and dismissing this action under the doctrines of sovereign immunity and official immunity, where **ultra vires** and unconstitutional actions of federal officials in defrauding an Indian tribe, breaching their fiduciary duties to members of the tribe and committing specific violations of law were well-pleaded by plaintiffs and uncontroverted by defendants.

5. Whether the granting of injunctive relief in a separate action for the same violations of the National Environmental Policy Act (NEPA) by the same officials renders moot plaintiffs' requests for (1) a declaration that the officials' actions were void **ab initio** and for damages, under NEPA, and, (2) mandamus, injunctive relief, a declaratory judgment and damages, under an entirely different statute (25 U.S.C. § 415).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the Constitution of the United States; the Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. §§ 701-706; the Acts of Congress relating to Indian affairs set forth in 25 U.S.C. §§ 1, 1(a), 2, 2(a), 9, 81, 415, and 621; the rule of federal civil procedure governing indispensable parties, 28 U.S.C. Rule 19; the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321-4347 (1972 Supp.); the statutes of the State of New Mexico concerning public nuisances, N.M. Stat. Ann. § 40A-8-1 (1953); the Advisory Committee Note to Amended Rule 19, 28 U.S.C. Rule 19; and the regulations governing the leasing of Indian tribal lands, 25 CFR §§ 131.5, 131.6, 131.7 (1970) are set forth in Appendix E, infra.

STATEMENT OF THE CASE

A. Federal Jurisdiction Bases

Federal jurisdiction in the court of first instance was invoked by plaintiffs under 28 U.S.C. § 1331 (general federal question jurisdiction), 5 U.S.C. §§ 701-706 (Administrative Procedure Act), 28 U.S.C. § 1343 (civil rights), 28 U.S.C. § 1361 (mandamus) and the court's pendent jurisdiction.

B. Nature of the Case

This is a class action by members of the Tesuque Indian Pueblo and their organization, the TEWA TESUQUE, against federal officials responsible for the negotiation and approval of a 99-year lease of Tesuque Pueblo lands and water for a non-Indian subdivision development, and against Sangre de Cristo Development Company, the lessee.

The named plaintiffs are all members of plaintiff TEWA TESUQUE organization, whose membership comprises more than half of the total population of the Pueblo. The TEWA TESUQUE was organized to advocate Tewa Indian traditionalism and to protect the Pueblo land and water rights. Several of the plaintiffs are past or present members of the Tesuque Pueblo Tribal Council and several were members of the Council at the time the lease was signed.

Plaintiffs' Complaint consists of seven causes of action: 1) breach of trust by federal officials in negotiating and approving the lease; 2) violation of The National Environmental Policy Act (NEPA) by failure to prepare an environmental impact statement; 3) violation of 25 U.S.C. § 415 by federal officials; 4) illegality of the lease under certain other federal statutes and regulations; 5) violation

of plaintiffs' civil rights under 42 U.S.C. §§ 1985 and 1988, and under the First and Fifth Amendments to the Constitution of the United States; 6) fraud by all defendants in negotiations of the lease; and 7) creation and maintenance of a public nuisance. Plaintiffs seek injunctive and mandamus relief, damages, and a declaratory judgment.

C. Course of Proceedings and Disposition Below

Plaintiffs' complaint was filed on August 15, 1972. The federal and corporate defendants moved to dismiss on October 17 and 19, 1972, respectively. The trial court granted defendants' motions to dismiss on July 2, 1973. On July 6, 1973, plaintiffs moved to vacate the dismissal order and for oral argument. Oral argument was granted and on July 13, 1973, the trial court denied plaintiffs' motion to vacate. Notice of Appeal was timely filed by plaintiffs on September 4, 1973.

The appeal was briefed and orally argued to the Court of Appeals for the Tenth Circuit, which entered judgment on July 12, 1974, affirming the trial court's dismissal of plaintiffs' Complaint. Plaintiffs filed a timely Petition for Rehearing en banc, which was denied by order entered on August 5, 1974.

During the pendency of defendants' motion to dismiss the instant case, the Tenth Circuit decided **Davis v. Morton** 469 F. 2d 593 (November 24, 1972) [App. C]. Upon remand, the trial court in **Davis** found that the Secretary's actions in approving this same lease were "irregular and not in compliance with (NEPA)" and enjoined any further development under the lease, unless and until the Secretary

complied with NEPA [App. D].[1] Consequently, plaintiffs in the case at bar moved for partial summary judgment on March 7, 1973, contending that there was no longer any genuine issue of material fact insofar as defendant Morton's liability under NEPA was concerned. The trial court's subsequent dismissal order stands as a tacit denial of that motion.

D. Material Facts

The following facts are conclusively established by the uncontroverted allegations of plaintiffs' Complaint, which provides the sole factual record herein. The defendants introduced no controverting affidavits or testimony whatsoever in support of their motions to dismiss.

The Tesuque Reservation is held in trust status by the United States for the benefit of Tesuque Pueblo.

In 1968, defendant Sangre de Cristo Development Company was formed to obtain a 99-year lease from Tesuque Pueblo and to establish a golf-resort subdivision community through the sale of subleases. The lease, covering 5,400 acres of the 15,000 acre Tesuque Reservation, was signed by Pueblo officials on April 17, 1970, and approved by the Secretary of the Interior on May 24, 1970. The Tesuque Tribe numbers 270. Plans call for a permanent population of 17,000 non-Indians on the leased lands.

The average level of education of Tesuque Indians is fifth grade. Most of the Tesuque Tribal Council members were illiterate in English, and many spoke only native Tewa.

FOOTNOTES

1. See **infra** nn. 6 and 11.

Only one or two members of the Council were able to read or understand the proposed lease. Neither the project nor the lease were ever explained in detail to the Council, or translated into Tewa.

At no time during the negotiations did the Pueblo Council have the advice or assistance of legal counsel, financial experts, or persons experienced in land subdivision, nor did any Tesuque have knowledge in these areas.

The Tesuque Tribal Council was falsely told by the developers and federal officials that: 1) the tribal lands hold water supplies adequate for the needs of the Pueblo and the subdivision; 2) the tribal lands are virtually worthless unless used for subdivision development; 3) defendant developer planned to build only a golf course on the leased lands.

The Council was never informed of alternative offers to develop the land.

The provisions of the lease commit 95 per cent of the Pueblo's water supply to the developers. As a consequence, the Pueblo must abandon all of its agriculture—an activity central to Pueblo life for religious as well as economic reasons. There will be insufficient water remaining even for domestic uses within the village. Moreover, the available water supply is wholly inadequate to meet the needs of the subdivision.

Defendant developer plans to rely on individual septic tanks for sewage disposal. As a consequence, all ground water in the area, including plaintiffs' domestic water supply, will be contaminated.

The payments to the Pueblo provided in the lease are far below actual economic rent (fair rental value). The lease

grants 450 acre-feet of water rights to the developers **free of charge**. This provision was not revealed to the Tribal Council prior to their approval of the lease. The cash value of this water right alone may be as great as $1,000,000, and exceeds by two or three times the present discounted value of **all** future income to the Pueblo under the lease.

If defendant developer is adjudged bankrupt, or the lease is cancelled **by its terms**, the Pueblo is obligated to provide water, streets, utilities, schools, parks, police protection, fire protection and "all other normal and usual municipal services" to sublessees. This would bankrupt the Pueblo since no money is to be set aside for establishment or maintenance of such services, no facilities have been constructed and the annual rents are wholly inadequate.

REASONS FOR GRANTING THE WRIT

I. REVIEWABILITY OF AGENCY ACTIONS AFFECTING INDIANS

The crux of the 10th Circuit's error in dismissing this case lies in its treatment of plaintiffs' status as members of an Indian Tribe as somehow significant in the application of jurisdictional doctrines which should be racially neutral.

In its discussions of indispensability and jurisdiction under the Administrative Procedure Act (A.P.A.), the Court states:

> "..., we hold that the Tewa has an adequate remedy available, i.e., bringing the dispute before the tribal council of the Pueblo for determination. This, we believe, is very critical in light of our well-established policy-rule that courts will not interfere with the internal workings of Indian Tribes (citations omitted). An internal dispute such as this should be decided by

the tribal council of the Pueblo and not by the courts." [App. B, p. 6].

"The Tewa have not demonstrated that they are suffering a legal wrong in view of the fact that the Pueblo through its tribal council could have voluntarily filed suit had it determined that the lease should be cancelled." [App. B, p. 4-5].

In effect, the 10th Circuit establishes a new doctrine of law—where actions of federal officials affect an Indian tribe, only the tribal government may seek judiciai review, even though the action directly affects the rights of individual Indians and (as subsequently shown herein) the agency actions are otherwise reviewable.

The Tenth Circuit apparently reaches this result because it is bothered by the possibility that individual tribal members may assert that agency action affecting the tribe as a whole violates individual rights, especially where such agency action has been approved by the tribal government.

Having assumed that the principle of "tribal sovereignty"—the policy that the federal government and the courts should not interfere in the internal affairs of Indian tribes—is at stake, the court was led to incorrect conclusions under the rules of indispensability and reviewability by which its dismissal is articulated.

But where, as here, plaintiffs assert individual injuries to rights under the Constitution and statutes of the United States, the policy of "tribal sovereignty" is misapplied.

This decision has the effect of arbitrarily shielding a whole category of federal agency actions from judicial review and discriminatorily denying aggrieved Indians their rights to review of, and damages for, **ultra vires** and unconstitutional actions by government officials.

II. JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT

The interpretations by the courts below of the language "committed to agency discretion by law...", 5 U.S.C. § 701, defining agency action for which there is no review under the Administrative Procedure Act, are in clear conflict with the interpretation proclaimed by this Court.

In **Citizens to Preserve Overton Park, Inc. v. Volpe**, 401 U.S. 402 (1971), this Court held:

> "This is a very narrow exception.... The legislative history... indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case **there is no law to apply**.'" **Id.** at 410, (emphasis added).

Whatever the undisclosed interpretation given to the phrase by the courts below, there clearly is "law to apply" in the case at bar within the meaning of **Overton Park**.[2]

This decision by the 10th Circuit also seriously conflicts with decisions by this Court in **U.S. v. SCRAP**, 412 U.S. 669 (1973); **Sierra Club v. Morton**, 405 U.S. 727 (1972) and **Association of Data Processing Service Organizations, Inc. v. Camp**, 397 U.S. 150 (1970), not only in failing to conclude that the Complaint satisfied the "injury in fact" and "zone of interests" interpretations of the A.P.A. language "adversely affected or aggrieved." 5 U.S.C. § 702.

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2. For example, NEPA; 25 U.S.C. § 415; 25 U.S.C. § 1, 1 (a), 2, 2 (a), 8, 9 and 621; 42 U.S.C. §§ 1985 and 1988; 43 U.S.C. § 1457 (10); 25 CFR §§ 131.5, 131.6, 131.7 and the First and Fifth Amendments to the Constitution, set forth explicit standards with which the defendant officials were obligated to comply in the exercise of their duties.

but in considering only the "legal wrong" language in that section.

See also Tooahnippah v. Hickel 397 U.S. 598 (1970), where this court found that agency action affecting an individual Indian is reviewable under the A.P.A.

III. INDISPENSABLE PARTIES

The decision by the 10th Circuit—that Tesuque Pueblo is a person in whose absence the action should be dismissed—evidences such a mechanical analysis of the factors specified in Rule 19 (b),[3] Federal Rules of Civil Procedure, as to subvert the 1966 amendments to the Rule and the clear pronouncements of this Court thereunder.

The 10th Circuit "analysis" of the first factor—"prejudice..."—is seriously defective in multiple respects.

1. Even if there had been any facts in the record to support the Court's conclusion that "if the lease is cancelled... [the Tribe] would lose rental income... [and]employment opportunities" [App. B, p. 4], as a matter of law, the Tribe could not be "prejudiced" thereby, within the meaning of Rule 19 (b).

The Court could cancel the lease only if it found a breach of fiduciary duties or fraud or other violation of law by defendants. Such a finding, however, is necessarily a simultaneous determination that the Pueblo has been harmed by defendants and will benefit by the

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3. Plaintiffs do not even concede that the Tesuque Tribe is a "necessary party", or a person for whom joinder was not feasible, within the meaning of Rule 19 (a).

relief demanded by plaintiffs. The lack of prejudice to the Tribe is even more clear should the Court choose not to cancel the lease, but to grant damages.

2. In analyzing the first factor, the Court considered only prejudice resulting from cancellation of the lease, rather than noting, as suggested by the second factor in Rule 19 (b), that any prejudice from cancellation could be averted by instead awarding damages.

3. More importantly, Rule 19 (b) explicitly states that the "prejudice" to be considered is prejudice as a result of one's **absence** from the suit, not merely prejudice as the result of a **judgment** which may be rendered in the suit regardless of one's presence or absence, as the 10th Circuit concluded. **Provident Tradesmens Bank and Trust Co. v. Patterson**, 390 U.S. 102, 115 (1968).

The 10th Circuit could not properly find, as a matter of law, that the interests of the Tesuque Tribe would be prejudiced by its absence from this suit. [4]

a. If the interests of the Tesuque Tribe lie in opposing this suit, then its interests in this action are adequately represented by the U.S. Department of Justice, as a matter of law.[5]

On the other hand, if the Tribe will benefit from the

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4. If, on the other hand, the 10th Circuit determined as a matter of **fact** that the Pueblo would be prejudiced by its absence, then the Court breached its duty, on a motion to dismiss, to construe all allegations of fact in favor of the party opposing the motion.

5. In **Heckman v. United States**, 224 U.S. 413 (1912), a suit by the United States to cancel conveyances of allotted

relief sought by plaintiffs, its interests will be adequately represented by plaintiffs, as representatives of the class.

b. In public actions, such as the case at bar, wherein rights asserted by the plaintiffs "arise independently of" and are "distinct and separate" from the provisions of the contract to which an unjoined person is a party, the unjoined person is not deemed "prejudiced" by his absence from the suit within the meaning of Rule 19 (b). **National Licorice Co. v. National Labor Relations Board**, 309 U.S. 350, 363 (1940);

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lands by members of the Cherokee Nation, this Court rejected the argument that the Indian grantors were persons in whose absence the suit should not proceed:

> "The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character, that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit... [the presence of the Indians] as parties to the suit is essential to their protection. This position is wholly untenable. **There can be no more complete representation than that on the part of the United States** in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from its tutelage.... It was not necessary to make these grantors parties, for the government was in court on their behalf." **Id.** at 445 (emphasis added).

Cf. **Cheyenne River Sioux Tribe of Indians v. United States**, 338 F. 2d 906, 910 (8th Cir. 1964), cert. den. 382 U.S. 815 (1965); **Pan American Petroleum Corp. v. Udall**, 192 F. Supp. 626 (D. D.C. 1961) and authorities cited therein and **Pueblo of Picuris v. Abeyta**, 50 F. 2d 12 (10th Cir. 1937).

Natural Resources Defense Council v. T.V.A., 340 F. Supp. 400, 407 (S.D. N.Y. 1971), rev. on other grounds, 459 F. 2d 255 (2nd Cir. 1972).

c. Decisions in related cases have implicitly held that the Pueblo would not be prejudiced by its absence from litigation involving the identical lease. [6]

4. Furthermore, this suit in no way seeks an adjudication of the rights or duties of the unjoined Tesuque Tribe. Plaintiffs do not contend that the action by the Tribal Government, in entering into the lease negotiated on its behalf by the defendant federal officials, was improper. Nor do plaintiffs seek damages or other relief against the Tribal Government or any of its officers.

The 10th Circuit opinion renders meaningless the second factor specified in Rule 19 (b)—whether prejudice to the absent person can be averted or lessened by the shaping of

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6. **Davis v. Morton**, 469 F. 2d 593 (10th Cir. 1972) [App. C] and **Norvell v. Sangre de Cristo Development Co.**, Civ. No. 9106, 372 Supp. 348 (D. N.M. 1974) were recent suits brought by non-Indian plaintiffs against the same defendants, involving the identical lease of Pueblo lands and the same assertions by defendants that the Pueblo was an indispensable party.

Like plaintiffs in the case at bar, plaintiffs in **Davis** sought an injunction and cancellation of the lease under NEPA. In **Davis**, indispensability proved no bar.

If the Tribe was not prejudiced by its absence in **Norvell**, despite the substantially greater impact on the Tribe threatened by the state's attempt to exercise plenary jurisdiction over the subdivision and all **future leases**, then it can not properly be held to be prejudiced by its absence from the case at bar.

the decree. See **supra**, p. 13.

The 10th Circuit additionally failed to take into account the ability of the absent party to appear voluntarily. 28 U.S.C. Rule 19, Advisory Committee Note to Amended Rule, subdivision (b), p. 106 (1972 ed.) and **Provident Tradesmens Bank and Trust Co., supra.**, at 114.

The Court's treatment of the third factor under Rule 19 (b)—the "adequacy" of a judgment rendered in the person's absence—evidences a refusal to undertake the analysis required by the rule of the **actual** possibility of additional suits if the instant action proceeds. Since this suit is a class action on the part of all members of the Tesuque Indian Tribe, all members who do not formally exclude themselves from the class will be bound by the judgment. Nor can the tribal entity recover in addition to the class.

The most egregious of the departures by the 10th Circuit from the dictates of Rule 19 (b) involves its interpretation of the fourth factor. The Court ruled that "the plaintiffs will have an adequate remedy if the action is dismissed for nonjoinder" in so far as they can bring the case before the Tribal Council for determination. [App. B, p. 4].

This conclusion is absurd. Clearly the Tribal Council can not award to plaintiffs relief against federal officials or the Sangre de Cristo Development Company.[7]

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[7]. The 10th Circuit also somehow determined that this matter is an "internal tribal dispute." [App. B, p. 5]. Not only would such a fact be irrelevant to any issues in this action; there is not one shred of evidence in the record to support the conclusion that an internal dispute exists, nor the necessary implication that plaintiffs do not have the

In fact, if the action in the case at bar is dismissed, plaintiffs will have no alternative forum or remedy whatsoever. Such a result would be completely contrary to considerations of "equity and good conscience." No other court which purported to follow Rule 19 standards, as interpreted in **Provident Tradesmens Bank and Trust Co., supra**, has dismissed a suit where plaintiffs would be left with no alternative remedy.

IV. SOVEREIGN IMMUNITY

According to the "general rule" of the soveriegn immunity doctrine, relief which is nominally directed against public officials may nevertheless be barred as relief, in effect, against the sovereign, if the relief sought would (1) expend itself on the public treasury or domain or (2) interfere with the public administration. **Larson v. Domestic and Foreign Commerce Corp.**, 337 U.S. 682 (1949); **Dugan v. Rank**, 372 U.S. 609 (1963).

Plaintiffs assert that this action does not even fall within the "general rule." [8]

Furthermore, plaintiffs' Complaint is bristling with well-pleaded allegations satisfying the repeatedly acknow-

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permission of their tribal government to assert their rights.

Furthermore, the assertion of an "internal dispute" is belied by the undisputed facts that:

a) this is a class action on behalf of all tribal members; and

b) plaintiffs seek no declaration that the actions of the tribal officials, in approving the lease, were improper.

8. The damages are sought against the defendant federal officials as individuals, not against the Treasury of the

ledged exceptions to the "general rule": actions of a government official which are not merely erroneous or tortious but (1) in violation of or in excess of his statutory authority,[9] or (2) unconstitutionally void. **Larson, supra**, at 689-90; **Dugan, supra**, at 621-22.

The principle that, on a motion to dismiss, uncontroverted allegations of fact must be accepted as verities, **U.S. v. SCRAP**, 412 U.S. 669, 689-90 (1973), applies, of course, to motions to dismiss based on a claim of immunity from suit. **Larson, supra**, at 691-92; **O'Bryan v. Chandler**, 352 F. 2d 987, 988-91 (10th Cir. 1965); **Franklin v. Meredith**, 386 F. 2d 958, 959 (10th Cir. 1967); **State of Washington v. Udall**, 417 F. 2d 1310, 1316 (9th Cir. 1969); **Carter v. Seamans**, 411 F. 2d 767, 770 (5th Cir. 1969).

In the case at bar, the dismissal by the district court was not founded on any determination that, as a matter of law, the plaintiffs' Complaint had failed to properly allege **ultra**

United States. The mandamus and injunctive relief would require that the **ultra vires** approvals of the lease be avoided and that in their future actions, the defendant officials refrain from perpetrating fraud upon or breach of their fiduciary duties toward the Tesuque Indians or otherwise violating the law. Such relief can hardly be deemed to "interfere with the public administration" within the meaning of the Supreme Court cases cited. Furthermore, since the plaintiffs have been entitled to such protections all along, the granting of such relief will not require public administrators to act in any manner different than if they had acted lawfully in the first place.

9. Plaintiffs have adequately alleged that defendant federal officials were without authority to approve the 99-year lease without the environmental analyses and

vires or unconstitutional action within the **Larson-Dugan** exceptions heretofor stated. Instead, the dismissal was rendered and affirmed on the basis of a premature adjudication on the **merits** of plaintiffs' claims of **ultra vires** conduct.[10]

Moreover, faced with only the allegations in the

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impact statement mandated by NEPA.

Plaintiffs have also alleged violations of law and the Constitution:

a) under 25 U.S.C. § 415, by the Secretary, in approving the submittals by developers, without first considering the impact of the development on the factors specified in that statute.

b) Under 25 U.S.C. § 81, by the federal officials in failing to execute said lease in conformance with the requirements of federal law;

c) a breach of trust by federal officials in negotiating and approving the lease, in violation of the limits on their authority to act consistent with their obligations to protect plaintiffs as Indians and wards of the government;

d) fraud by all of the defendants in negotiation of the lease, in violation of the common law and of defendant federal officials' obligation to protect plaintiff Indians as wards of the government;

e) the creation and maintenance of a public nuisance, in violation of the common law and 40A-8-1, N.M. Stat. Ann. (1953); and

f) injury to the civil rights of the plaintiffs, by the destruction of their religion and deprivation of their homeland in violation of 42 U.S.C. §§ 1985 and 1988 and the First and Fifth Amendments to the United States Constitution.

10. The cases ostensibly relied upon by the Court of Appeals in the case at bar as authority for such an

Complaint, the Courts' conclusion that the federal officials' actions were "within the outer perimeter of their authority" [App. A, p. 3; App. B, p. 5] was unsupported by any facts in the record. The most rudimentary concepts of Fifth Amendment due process require that an appellate court rule only on the basis of known facts of record. Cf. **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U.S. 292 (1937).

The practices of the courts below arbitrarily prevent litigants from invoking the well-defined exceptions to the sovereign immunity defense and thereby leave **ultra vires** actions of public officials totally immune from review.

Much worse, unless reversed, this decision will foreclose such judicial review only in cases brought by Indians.[11]

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adjudication of the merits in fact involved the significantly different determinations of motions for summary judgment, based on affidavits, depositions and other items of record. **Sowders v. Damron**, 457 F. 2d 1182 (10th Cir. 1972); **Chavez v. Kelly**, 364 F. 2d 113 (10th Cir. 1966); **Preble v. Johnson**, 275 F. 2d 275 (10th Cir. 1960).

11. Although plaintiffs in **Davis v. Morton**, 469 F. 2d 593 (10th Cir. 1972) [App. C] and in **Norvell v. Sangre de Cristo Development Co.**, Civ. No. 9106, 372 F. Supp. 348 (D. N.M. 1974) did not explicitly discuss the defense of sovereign immunity, their rejection of defendants' assertion of the applicability of this defense to the **ultra vires** conduct by defendant officials which plaintiffs in those cases **alleged**, was necessarily implicit in their respective decisions to go ahead and rule on the merits of the causes of action.

Indeed, plaintiffs in the case at bar make the **identical** allegations—that defendants' actions were in excess of the limits on their authority under NEPA—which were made and implicitly found sufficient in **Davis**.

V. OFFICIAL IMMUNITY

The 10th Circuit also failed to even recognize that, unlike plaintiffs' claims for injunctive relief, plaintiffs' demand for damages from a federal officer, as an individual, does not even raise considerations of "sovereign immunity." **Larson, supra**, at 687.

Instead, such claims involve the doctrine of "official immunity," which is limited by considerations wholly ignored by the 10th Circuit.

In **Doe v. McMillan**, 412 U.S. 306 (1973), this Court explicitly rejected the argument that "official immunity automatically attaches to any conduct expressly or impliedly authorized by law..." **Id.** at 322. Instead, the limits of official immunity are to be determined by whether the "legitimate... needs" of the particula, branch of government have been exceeded. **Id.** at 324-25.

It is inconceivable that a court would hold that breach of trust, fraud, violations of NEPA and the other illegal actions alleged to have been perpetrated upon the Indian plaintiffs are "legitimate... needs" of the Department of the Interior and its Bureau of Indian Affairs, such that the "contributions of [official] immunity to effective government in... [this]context... outweigh the... harm to individual citizens..."[12] **Doe v. McMillan, supra**, at 320, 324-25.

Furthermore, in the absence of a record adequate for making such a determination, it was error for the courts below to have dismissed plaintiffs' damage claims. **Id.**

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12. Let alone "within the scope of their authority" or "constitutional."

at 324, and cases cited **supra**, p. 18.

Unless reversed, such gross disregard of the decisions of this Court will foreclose any possibility in the 10th Circuit of " 'protect[ing]. . . individual citizen[s] against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government.' " **Barr v. Matteo**, 360 U.S. 564, 565, (1959), quoted with approval in **Doe v. McMillan, supra** at 319.

VI. MOOTNESS

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." **Powell v. McCormack**, 395 U.S. 486 (1969).

Where one of several issues becomes moot, "the remaining live issues supply the constitutional requirement of a case or controversy." **Id.** at 497.

Although the issue whether the failure to issue an impact statement for this action by the Secretary of the Interior was a violation of NEPA was decided in **Davis v. Morton, supra**, on remand [App. D], that case left undecided the following issues of major importance in the case at bar:

1. plaintiffs' claim that the failure of the Secretary to abide by NEPA rendered his approvals of the lease and of subsequent submissions by developers void and of no effect;

2. plaintiffs' demand for damages against federal officials under NEPA;

3. plaintiffs' right to a determination of the adequacy of an impact statement when issued;

4. plaintiffs' claim that 25 U.S.C. § 415 imposes **continuing** obligations upon federal officials to monitor and

regulate the development.

Thus, it can not be said that:

> "a determination by this Court of the legal issues is no longer necessary to compel the result [sought by plaintiffs], and could not serve to prevent it." **DeFunis v. Odegaard**, U.S. 94 S. Ct. 1704, 1706 (1974).

In sum, the 10th Circuit's conclusion that all issues in the case at bar involving NEPA and 25 U.S.C. § 415 were mooted by **Davis v. Morton, supra**, is in direct conflict with the decisions of this Court.

CONCLUSION

By its sweeping misuse of important doctrines and rules of civil procedure, the 10th Circuit arbitrarily shields from judicial scrutiny a whole category of federal agency actions—actions affecting members of Indian tribes. As a consequence, aggrieved Indians are discriminatorily denied their rights to judicial review of such agency actions and to damages for those actions of federal officials which are **ultra vires**.

The life of the reservation Indian is subject to more extensive regulation by government than the life of any other American. Thus, his rights are more susceptible to infringement as a result of agency abuses.

It is well recognized that the administration of Indian affairs by the Department of the Interior has historically been characterized by a pervasive pattern of serving the interests of the white man in derogation or outright breach of the government's fiduciary relationship to the Indian.

That history is summarized in **United States v. Ahtanum Irrigation District**, 236 F. 2d 321 (9th Cir. 1956); cert. den. 352 U.S. 988; 330 F. 2d 897 (9th Cir. 1956); 338 F.

2d 307 (9th Cir. 1964); cert. den. 381 U.S. 924. [App. E].

The doctrinal errors made by the 10th Circuit in the case at bar give the Department of the Interior and the Bureau of Indian Affairs a renewed license to continue their historic practice of disregard for their fiduciary and statutory duties to Indians, secure in the knowledge that their actions, no matter how outrageous, are virtually immune from review.

Therefore, it is of the utmost importance that this decision of the 10th Circuit, which denies Indian complainants their precious rights to judicial review of agency actions, not be allowed to stand.

A writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.
Tewa Tesuque v. Morton

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
No. 9630 CIVIL

THE TEWA TESUQUE, an unincorporated association, JOE D. PINO, MARCUS VIGIL, EVA MITCHELL, LORENCITA PINO, JOHN MORA, JOHN VIGIL, SUSIE DORAME, IGNACIA DURAN, BEA REYNOLDS, SHIRLEY DURAN, JOE A. DURAN, ELOY HERRERA, CARMELITA HERRERA, VIVIAN HERRERA, PRISCILLA VIGIL, GILBERT VIGIL, VICKY VIGIL, MARGARET VIGIL, BOB MOQUINO, MARY MOQUINO, MILLER E. VIGIL, ANASTACIA PINO, EUSEVIA PADILLA, MARIA C. HERRERA, VASELLIO HERRERA, BERTHA VIGIL, REYES DURAN, STELLA DURAN, MARZELLA LEAF, MILTON HERRERA, MARSHA LEAF, CINDY HERRERA, GARY MOQUINO, CONNIE MOQUINO, ELMER VIGIL, LORRAINE VIGIL, DONNA HERRERA, CLIFFORD MOQUINO, YVONNE C. VIGIL, CORWIN VIGIL, DONNA MITCHELL, ARNOLD MITCHELL, JAMES F. DURAN, A. ADAM DURAN, RANDY MOQUINO, DENISE L. DORAME, VIRGIE DURAN, CECILIA ENOS, LEONARD ENOS, MARK MITCHELL, Plaintiffs,

vs.

ROGERS C.B. MORTON, individually and as Secretary of the Interior of the United States; LOUIS R. BRUCE, individually and as the Commissioner of the Bureau of Indian Affairs; WALTER O. OLSON, individually and as the Albuquerque Area Director of the Bureau of Indian Affairs; ROBERT FRIEDMAN, individually and as Superintendent of the Northern Pueblos Agency of the Bureau of Indian Affairs; JOSEPH KINGSOLVER, individually and as the Bureau of Indian Affairs co-ordinator for the Tesuque Pueblo or Tribe of Indians, and the SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., Defendants.

MEMORANDUM OPINION

The Court heretofore entered its Order of Dismissal of the above mentioned case on July 2, 1973. The Plaintiffs have now filed a "Motion to Vacate Order Of Dismissal And For Oral Argument" and have also filed a memorandum of authorities in support of their motion.

There are two questions raised by the entry of the Order. First, the Court held that it was without jurisdiction in this action because the Pueblo De Tesuque was not made a party to the suit and that since it was a suit to cancel a lease, all parties to the lease had to be before the Court. Secondly, the Court held that the actions of the Federal Defendants were within the outer perimeter of their duties and that they were, therefore, immune to suit.

It is a fundamental principle of the law that an instrument may not be cancelled by a Court unless the parties to the instrument are before the Court. In the case of **Page v. Town of Gallup, et al**, 26 N.M. 239 (1920) the Court had this to say:

> "In a suit to set aside and annul a written executory contract, and to perpetually enjoin one of the parties thereto from performing the contract on his part, all the parties to the contract are necessary and indispensable parties to the suit, without which the court is without jurisdiction to annul such contract, or to enjoin a party from performing it. This principle of law was announced by this Court in the case of Walrath v. Board of Commissioners, 18 N.M. 101, 134 Pac. 204. It was there said that the Court will take notice of the absence of indispensable parties when such fact is made to appear, though not raised by the pleadings, or suggested by counsel, and will dismiss the plaintiff's bill, when to grant the relief prayed would injuriously affect persons materially interested in the subject matter and not made a party."

In the case of **Isaacks v. Jeffords** 144 F. 2d 26 at page 30, Circuit Judge Bratton made the following statement:

> "It is settled law in New Mexico that a contract, or conveyance of property, cannot be annulled without all parties to it, or their legal representatives, being parties

to the action. Page v. Town of Gallup, 26 N.M. 239, 191 P. 460."

In 13 Am Jur 2d, 538, Cancellation of Instruments paragraph 56 reads as follows:

"In an action for cancellation of an instrument all persons whose rights or interests will be affected by the cancellation are proper and necessary parties. A petition for cancellation is demurrable when it shows on its face that indispensable parties are not joined as plaintiff or defendant."

The same law is found in 12 CJS 1028 under Cancellation of Instruments, where it says:

"All parties to the instrument sought to be cancelled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants..."

In the case of **Emhart Corp. v. McLarty**, et al 226 Ga. 621, 176 S.E. 2nd 698 (1970) the first headnote reads as follows:

"In action for cancellation of deed, all parties to deed are necessary parties, and absence of such party is fatal defect."

While the foregoing citation has reference to a deed it would be just as binding in the case of a lease.

The same law is found in 77 ALR 2d 1013 which is a quotation from **Roberts v. Cooter** 184 Kan 805, 339 Pacific 362, 77 ALR 2d 1005 page 1013, which reads as follows:

"When instituting a suit for the cancellation of a written instrument, the plaintiff should join as parties plaintiff or as parties defendant, according to the nature of their interest, all persons whose rights or privileges may be in any way affected by the granting of the relief sought. Toklan Royalty Corp. v. Panhandle Eastern Pipe Line Co., 168 Kan 259 Syl § 5 and corresponding portion of opinion, 212 P2d 348; 9 Am Jur, Cancellation of Instruments § 52, p 1027."

We next pass to the dismissal of the case against the Federal Defendants. There was no question that the lease was executed with their approval in the exercise of their discretion. The Court dismissed the Federal Defendants

on the grounds that they were acting within the outer perimeter of their authority and that they were thereby immune from suit. They were being sued both individually and in their official capacity. The question is well discussed in the case of **Sowders v. Damron** 457 F. 2d 1182 (1972) which is a decision by the 10th Circuit Court of Appeals in a case that originated in this Court. That case was a suit against an Internal Revenue officer. This Court relied on certain decisions mentioned in that opinion. Among other things the Court said the following:

"The law of privilege as a defense by government officers to civil damage suits for defamation and torts has been long applied to the judicial, legislative and executive branches of our Government. See Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959) for a review of the cases bearing on this matter."

From the foregoing it is seen that the Federal Defendants are immune from any suit individually and insofar as the lease is concerned the Court has herein shown it could not be cancelled without naming all parties to the lease. It is apparent, therefore, that a suit may not be maintained against the Federal Defendants on either basis.

Plaintiffs rely on **Jackson v. Sims** 201 F. 2d 259 (CA 10th 1953) and **Chickasaw Nations v. Seitz** 193 F. 2d 456 (10th Cir. 1951).

The Chickasaw case is readily distinguishable from the case at bar in that it was a suit by the Choctaw and Chickasaw Nations against others. It passing the Court might state that headnote 6 of the case reads as follows:

"An 'indispensable party' is one who has such an interest in the subject matter of controversy that a final decree cannot be rendered between the other parties to suit without radically and injuriously affecting his interest, or without leaving controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

The Jackson case is not in point but it bears out the action of the Court in this case.

Plaintiffs also rely on 5 USC 701 et seq. The reference to

5 USC 701 et seq is not sufficient unless the Plaintiffs show, or in their brief demonstrate to the Court, that something has been done bringing them within the protection of a relevant statute. In **Braude v. Wirtz** 350 F. 2d 702 (1965) at pages 707-708, The Court states as follows:

> "To support standing to sue under Sec. 10 (a) of the Act it is not enough for appellants to show that they have been 'adversely affected or aggrieved.' In addition, there must be a showing of adverse effect or aggrievement 'within the meaning of any relevant statute'."

The Plaintiffs may claim that they are aggrieved but they have not alleged that they are aggrieved within the meaning of any relevant statute.

Accordingly, the motion should be and it is hereby denied.

H. Vearle Payne
UNITED STATES DISTRICT JUDGE

Appendix B.
Tewa Tesuque v. Morton

United States Court of Appeals
Tenth Circuit
No. 73-1817

THE TEWA TESUQUE, an unincorporated association, JOE D. PINO, MARCUS VIGIL, EVA MITCHELL, LORENCITA PINO, JOHN MORA, JOHN VIGIL, SUSIE DORAME, IGNACIA DURAN, BEA REYNOLDS, SHIRLEY DURAN, JOE A. DURAN, ELOY HERRERA, CARMELITA HERRERA, VIVIAN HERRERA, PRISCILLA VIGIL, GILBERT VIGIL, VICKI VIGIL, MARGARET VIGIL, BOB MOQUINO, MARY MOQUNIO, MILLER F. VIGIL, ANASTACIA PINO, EUSEVIA PADILLA, MARIA C. HERRERA, VASELLIO HERRERA, BERTHA VIGIL, REYES DURN, STELLA DURAN, MARZELLA LEAF, MILTON HERRERA, MARSHA LEAF, CINDY HERRERA, GARY MOQUINO, CONNIE MOQUINO, ELMER VIGIL, LORRAINE VIGIL, DONNA HERRERA, CLIFFORD MOQUINO, YVONNE C. VIGIL, CORWIN VIGIL, DONNA MITCHELL, ARNOLD MITCHELL, JAMES F. DURAN, A. ADAM DURAN, RANDY MOQUINO, DENISE L. DORAME, VIRGIE DURAN, CECILIA ENOS, LEONARD ENOS, MARK MITCHELL,

Plaintiffs-Appellants,

vs.

ROGERS C.B. MORTON, individually and as Secretary of the Interior of the United States; LOUIS R. BRUCE, individually and as the Commissioner of the Bureau of the Indian Affairs; WALTER O. OLSON, individually and as the Albuquerque Area Director to the Bureau of Indian Affairs; ROBERT FRIEDMAN, individually and as

Superintendant of the Northern Pueblos Agency of the Bureau of Indian Affairs; JOSEPH KINGSOLVER, individually and as the Bureau of Indian Affairs coordinator for the Tesuque Pueblo or Tribe of Indians, and the SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

Defendants-Appellees.

Thomas E. Luebben, Jr., Native American Legal Defense & Education Fund, Inc., Albuquerque, New Mexico (Richard L. Young, Native American Legal Defense & Education Fund, Inc., Albuquerque, New Mexico, on the brief) for Appelants.

Edward J. Shawaker, Department of Justice, Washington, D.C. (Wallace H. Johnson, Assistant Attorney General, Albuquerque, New Mexico; Victor R. Ortega, United States Attorney, Albuquerque, new Mexico; Jacques B. Gelin, Department of Justice, Washington, D.C., on the brief) for Federal Appellee.

Dick A. Blenden, Carlsbad, New Mexico, for Sangre de Cristo Development Co., Inc., Appellee.

Before LEWIS, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

This is an appeal from dismissal of a class action brought by members of the Tewa Tesuque (Tewa) of the Pueblo of Tesuque (Pueblo), an Indian tribe, seeking damages and equitable relief against federal officials and for cancellation of a 99-year lease between the Pueblo and Sangre de Cristo Development Company (Sangre).

The Tewas' complaint alleged seven causes of action:

(1) breach of trust by federal officials in negotiating and approving the lease; (2) violation of the NEPA by failure to prepare an Environmental Impact Statement; (3) violation of 25 U.S.C.A. § 415 by federal officials; (4) illegality of the lease under other federal statues and regulations; (5) violation of Tewas' civil rights under 42 U.S.C.A. §§ 1985 and 1988 and under the First and Fifth Amendments to the Constitution of the United States; (6) fraud by appellees in the negotiations for the lease; and (7) creation and maintenance of a public nuisance. The District Court dismissed the complaint for failure to join the Pueblo as an indispensable party and because of the sovereign immunity of the United States.

The appellants include 50 members of the Pueblo, each of whom are members of the Tewa, an unincorporated association of members of the Pueblo who are opposed to the 99-year lease granted to Sangre. Sangre, as lessee, entered into the 99-year lease with the Pueblo, as lessor, on April 17, 1970. By its terms Sangre obtained a lease on a 1,300 acre tract, Tract I, together with lease options on four other tracts consisting of 5,400 acres. Sangre intends to develop the land for residential, recreational ,and commercial purposes, resulting in a city of non-Indians with a projected population of about 17,000. The subdivision is laid out and designed around an 18-hole golf course. The lease was approved by the Secretary of the Interior on May 24, 1970, pursuant to 25 U.S.C.A. § 415(a) which grants wide discretion. The pueblo is to receive a maximum rental of $20 per acre per year for the leased lands, effective in 1994. For the first twelve years of the lease, the Pueblo will receive $2.50 per acre.

The Tewa contend that the Pueblo is not an indispensable party to the action and that the doctrine of sovereign immunity does not bar this action against federal officials.

I.

The Tewas' contention that the Pueblo is not an indispensable party is erroneous. An indispensable party is one whose interest will be affected by the judgment. As lessor of the lease agreement entered into with Sangre, the Pueblo will certainly be affected if the lease is cancelled. Therefore, it is an indispensable party. Further, the Pueblo may not be joined without its consent or the consent of Congress in light of its quasi-sovereign status.

Rule 19(b), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes four factors which must be considered in determining whether the trial court should dismiss for non-joinder of an indispendable party:

> . . . . first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In considering the first factor, we conclude that the Pueblo would be prejudiced by a judgment in its absence. If the lease is cancelled it would lose its rental income to be derived therefrom, together with employment opportunities for its members. With reference to the second factor, we hold that the above recited prejudice cannot be lessened if the lease is cancelled. Relating to the third factor, we hold that the judgment sought herein would not be adquate in the Pueblo's absence because it may very likely invite additional lawsuits. Under the last factor, we hold that the Tewa has an adequate remedy available, i.e., bringing the dispute before the tribal council of the Pueblo for

determination. This, we believe, is very critical in light of our well-established policy-rule that courts will not interfere with the internal workings of Indian tribes. Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963). An internal dispute such as this should be decided by the tribal council of the Pueblo and not by the courts.

The Tewa contend that the issue of indispensability of the Pueblo has been decided in Norvell v. Sangre de Cristo Development Company, Inc., Civil No. 9106, F. Supp. (D. N.M. 1974), and Davis v. Morton, 469 F2d 593 (10th Cir. 1972). No final decision has been rendered in **Norvell** and, in any event, the case does not have the immediate effect of depriving the Pueblo of valuable rights under a contract. The **Davis** case held, under the same 99-year lease, that approvals of the lease would be enjoined until an environmental impact statement had been filed. The Court also held that approval of leases on federal lands constitutes major federal action. The suit did not, however, result in cancellation of the lease. **Davis** did not involve the issue of indispensability of the Pueblo.

Any prayer for relief insofar as it relates to the allegations set forth in the second and third causes of action in the complaint, i.e., violation of NEPA by failure to prepare an Environmental Impact Statement and violation of 25 U.S.C.A. § 415 by federal officials, has been rendered moot by our decision in **Davis**. The Court did not err in dismissing the action for failure to join the Pueblo as an indispensable party.

II.

In seeking injunctive relief and damages the Tewa contend that the doctrine of sovereign immunity does not

bar this action against the designated federal officials because they acted beyond the scope of their authority in approving the lease.

We hold that this suit against the named federal officials is in reality an unconsented suit against the United States barred by the doctrine of sovereign immunity. National Indian Youth Council, Intermountain Indian School Chapter v. Bruce, 485 F.2d 97 (10th Cir. 1973), appeal pending; McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971). While it is well-settled that government officials may not rely on the defense of sovereign immunity when they act either beyond the scope of their statutory authority or unconstitutionally, we hold that the District Court did not err in holding that the discretionary acts of the appellees exercised in the case at bar are within the outer perimeter of their authority and that they are, accordingly immune from suit. The Tewas' claim for injunctive and damage relief was properly denied.

The Tewa contend that the Administrative Procedure Act applies and that sovereign immunity is not available as a defense where relief is sought thereunder. 5 U.S.C.A. § 701-706. It is fundamental that a party suing under the APA must have suffered a legal wrong because of agency action or inaction. The Tewa have not demonstrated that they are suffering a legal wrong in view of the fact that the Pueblo through its tribal council could have voluntarily filed suit had it determined that the lease should be cancelled. The APA does not provide a basis for review of governmental decisions where the doctrine of sovereign immunity bars suit. Rockbridge v. Lincoln, 449, F.2d 567 (9th Cir. 1971)

AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
NOVEMBER, 1972, TERM
No. 72-1214

ABEL DAVIS, ELIOT PORTER, SANTA FE AREA DEFENSE FUND, INC. (a nonprofit New Mexico corporation), CENTRAL CLEARING HOUSE, INC. (a nonprofit New Mexico corporation), Plaintiffs-Appellants,

v.

ROGERS C.B. MORTON, Secretary of the Interior of the United States of America; LEWIS R. BRUCE, Commissioner of Indian Affairs in the Department of the Interior; and WALTER O. OLSON, Area Supervisor of the Bureau of Indian Affairs of the Department of the Interior, Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
[District Court No. 9190]

W.B. Kelly, Santa Fe, New Mexico, for Plaintiffs-Appellants.

Dennis M. O'Connell, Department of Justice, Washington, D.C. (Kent Frizzell, Assistant Attorney General; Victor R. Ortega, United States Attorney, Richard J. Smith, Assistant United States Attorney, Albuquerque, New Mexico; and Carl Strass, Department of Justice, Washington, D.C., for Defendants-Appellees.

Before HILL, HOLLOWAY and BARETT, United States Circuit Judges.

HILL, Circuit Judge.

This is an appeal from the United States District Court for the District of New Mexico for dismissing appellants' complaint against the United States government;

appellants allege the government failed to follow the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., and of 25 U.S.C. § 415 before approving a 99-year lease on the Tesuque Indian Reservation in Santa Fe County, New Mexico.

The facts are simple and uncontroverted. On April 17, 1970, a 99-year lease of restricted Indian lands was executed by the Pueblo of Tesuque (Pueblo), as lessor, and Sangre de Cristo Development Company, Inc. (Sangre), a New Mexico corporation, as lessee. The agreement granted Sangre a lease on a 1300-acre tract of land called "Tract 1" and granted lease options on four other tracts, thereby subjecting approximately 5400 acres to the lease. The purpose of the lease is to develop the property for residential, recreational and commercial purposes. Ultimately a small city is planned with a population of approximately 15,000 inhabitants.

On May 24, 1970, appellee Walter O. Olson, Area Supervisor for the New Mexico District of the Bureau of Indian Affairs of the Department of the Interior, approved the lease agreement pursuant to 25 U.S.C. § 415. Olson's authority was granted to him by appellee Lewis R. Bruce, Commissioner of Indian Affairs in the Department of the Interior, and by appellee Rogers C.B. Morton, Secretary of the Interior of the United States. Subsequent to this initial lease approval, appellees have approved a master plan for the development of the total acreage, a plat plan for the first phase of development, deed restrictions, the make-up of an architectural and engineering review board, and the plan for the development of a condominium apartment complex on Tract 1 of the leased premises. Appellants, two of whom are landowners living near the leased Indian property and two of whom are non-profit corporations concerned with protection of the environment, filed the complaint on October 22, 1971, asking for a preliminary injunction enjoining future work by Sangre on the leased premises. Appellants charged that appellees were without authority to grant the lease since no environmental impact study was conducted prior to approval of the lease as

required by NEPA, 42 U.S.C. § 4332 (2) (C).[1] They further asserted that Appellees violated 25 U.S.C. § 415(a)[2] by "approving the lease on Indian lands without first being assured that certain statutory mandates had been met. Appellants requested the court to issue a preliminary and permanent injunction enjoining appellees from approving, allowing or acting in any way on submissions or approvals required or permitted under the lease agreement until the environmental impact of the project had been studied and evaluated. Appellants further requested the court issue a Writ of Mandamus requiring appellees to follow mandates of NEPA before taking any future action on the Pueblo lease.

The hearing on the preliminary injunction was held November 22, 1971, and thereafter the court entered its order denying appellants' motion for preliminary injunction. Later the court adopted the findings of fact and conclusions of law with respect to the merits of the action, and dismissed appellants' complaint with prejudice. The trial court concluded the lands in question are owned by the Pueblo subject to a restraint on alienation without approval of the Secretary. The United States was not a party to the lease, but rather was acting as a fiduciary or guardian of the Pueblo interests in the lease. The only "federal action" was in approving the lease; as the United States has no interest in the lease, their approval does not constitute "major federal action." Therefore, 42 U.S.C. § 4332 (2) (C) does not apply. In support of this conclusion, the trial court reasons that since the amendment to 25 U.S.C. § 415 specifically relates to environmental concerns on Indian lands, and was passed after NEPA, it is logical to infer that NEPA did not cover Indian lands or there would be no need to have amended § 415. The trial court's second conclusion is that since § 415 was amended on June 2, 1970, more than a week after the Secretary approved the lease, it has no effect on the lease.

Two issues are presented on appeal. First, does the Secretary's authority to ratify or reject leases relating to Indian lands constitute major federal action? Second, does

25 U.S.C. § 415, as amended, have any effect on a lease signed before the amendment's enactment date? As we answer the first issue in the affirmative, it will be unnecessary to discuss the retroactive effect of § 415.

Appellees' primary thesis is that although the contractual relationship between *Sangre and the Pueblo* is a lease, it is not a federal lease and therefore does not constitute major federal action. The United States did not initiate the lease, was not a party, possessed no interest in either the lease or the development, did not participate financially or benefit from the lease in any way. Before federal action will constitute major federal action under the mandates of NEPA, the government must initiate, participate in or benefit from the project.

We feel the government's interpretation of NEPA is too constrained for our court to adopt. Title 42 U.S.C. §4331 (b) states:

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to... (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, whenever possible, an environment which supports diversity and variety of individual choice;....

These general mandates reflect Congress' attitude toward preserving our environment. To ensure the implementation of these substantive requirements, Congress established procedural guidelines. One in particular applies to the instant case, 42 U.S.C. § 4332 (2) (C). This section directs all agencies to present a detailed statement on the environmental impact of the proposed action. This impact statement will aid the agency in determining what proper course of action should be taken in each situation as it

arises.

It is clear Congress passed this legislation out of concern for our natural environment. NEPA requires all federal agencies to consider values of environmental preservation in their spheres of activity. As the court stated in Calvert Cliffs' Coord. Comm. v. United States A.E. Comm'n, 449 F. 2d 1109 (D.C. Cir. 1971):

> NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted but compelled to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to **consider** environmental issues just as they consider other matters within their mandates. (p. 1112).

Senator Jackson, NEPA's principal sponsor, said on the floor just before final Senate approval that the Act "directs all agencies to assure consideration of the environmental impact of their actions in decisionmaking." 115 Cong. Rec. (Part 30) 40416 (1969). Reading the Act and its legislative history together, there is little doubt that Congress intended all agencies under their authority to follow the substantive and procedural mandates of NEPA.

The problems boils down to whether granting leases on Indian lands constitutes major federal action as required in NEPA § 102 (2) (C). Upon review of the lease and relevant case law, we feel the lower court erred in holding the lease did not constitute major federal action. The lease refers to the United States government countless times. All notices and approvals must be made by the Pueblo and the United States. The Secretary is required to give written approval before encumbrances can be made on the leased land. The lease protects the United States government against damage or injury to people or property on the leased premises. Certainly the fact the United States government

might be held liable for injury or damages incurred on the Indian land unless the lease provides otherwise makes the government more than an impartial, disinterested party to the contract between the Pueblo and Sangre.

Recent case law sheds some light on what constitutes major federal action under NEPA § 102 (2) (C). In Green County Planning Board v. Federal Power Comm'n, 455 F. 2d 412 (2d Cir. 1972), the case centered around the licensing procedures of the Federal Power Commission. The question of whether granting a license to construct a high voltage line constituted major federal action was never in issue, because all parties conceded granting the license was major federal action. In this case the only involvement necessary to constitute major federal action was the approval by the governmental department of a project under its jurisdiction.

Another case showing the only involvement necessary by the federal government to constitute major federal action is approving or licensing the project is Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971). In that case the district court required the Atomic Energy Commission to prepare an environmental impact statement before issuing an interim operating license for a nuclear power plant. Another poignant example of what constitutes major federal action occurred in a suit by the City of New York to annul an order of the Interstate Commerce Commission authorizing the abandonment of a railroad line. The court concluded:

> While the Commission may initially have thought that, as a general matter, abandonment proceedings were not within the provisions of NEPA, subdivisions (A), (B) and (D) among others, of § 102 (2), 42 U.S.C. § 4332 (2), impose a number of duties on all federal agencies with respect to the consideration and exploration of the environmental effects on their decisions and plans, and the obligation of a federal agency to adhere to these subdivisions in all instances is essentially unqualified. City of New York v. United States, 337 F. Supp. 150, 158 (E.D.N.Y. 1972).

Appellees concede that where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the interstate commerce clause or other constitutional authority, federal approval constitutes major federal action. But appellees argue the government is operating in a different capacity when dealing with Indian lands. It is the appellees' contention that Indian lands, such as those of the Pueblo, are held in trust by the government for the Indians. Therefore, the appellees should approve the lease if it is advantageous to the beneficiaries of the trust.

Appellees also charge that Congress did not intend to enmesh the discretionary execution of these fiduciary duties in the procedural and bureaucratic web that NEPA § 102 (2) (C) imposes. To impose this burden on private Indian land places the Indians at an economic and competitive disadvantage, and subjects their poverty to judicial challenge by non-Indian competitors laboring under no such environmental restriction.

It is interesting to note that appellees proffer no case law to support their arguments. The fact Indian lands are held in trust does not take it out of NEPA's jurisdiction. **Cf.** Federal Power Comm'n v. Tuscarora, 362 U.S. 99, 116 (1960). All public lands of the United States are held by it in trust for the people of the United States. Utah Power & Light v. United States, 243 U.S. 388, 409 (1916). To accept appellees' contention would preclude all federal lands from NEPA jurisdiction, something clearly not intended by Congress in passing the Act.

Appellees' second contention that Congress did not intend to enmesh the discretionary execution of these fiduciary duties in the procedural and bureaucratic web imposed by NEPA § 102 (2) (C) also falls on deaf ears. In Calvert Cliffs' Coord. Comm. v. United States A.E. Comm'n, supra, the court answered this problem by stating that "Section 102 duties are not inherently flexible... Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." (p. 1115).

We conclude approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates. As our court had occasion to consider once before, this Act was intended to include all federal agencies, including the Bureau of Indian Affairs. See National Helium Corporation v. Morton, 455 F. 2d 650 (10th Cir. 1971).

The lower court felt NEPA did not apply to Indian lands or otherwise the amendment to 25 U.S.C. § 415 would not have addressed the problem of environmental concerns. We do not draw that conclusion. NEPA is a very broad statute covering both substantive and procedura' problems relating to the environment. The amendment to 25 U.S.C. § 415 deals primarily with the addition of Indian tribes to the group having long-term lease authority. Only briefly is the environmental problem discussed. The amendment only requires the Secretary to satisfy himself on the environmental issue; nowhere are any specific procedural guidelines set out as in NEPA. In Calvert Cliffs' Coord. Comm. v. United States A.E. Comm'n, supra, a similar problem arose. The court correctly determined that unless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force. The reasoning is applicable in the instant case. The general statement in § 415 in no way implies leases on Indian lands were not covered by NEPA. The amendment merely reaffirms congressional intent that environmental considerations are to play a factor in any Bureau of Indian Affairs decisions.

For the reasons stated above, we feel the lower court erred in dismissing appellants' request for a temporary and permanent injunction enjoining appellees from approving or acting on any submissions or approvals under the lease until the environmental impact of the project is studied and evaluated.

The judgment appealed from is reversed, and the case is remanded to the trial court with directions to grant the relief prayed for.

FOOTNOTES

1. The Congress authorizes and directs that, to the fullest extent possible:... (2) all agencies of the Federal Government shall—... (C) include in every recommendation or report on proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented...

2. 25 U.S.C. § 415, as amended:

(a) Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes.... Prior to the approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structure or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the **effect on the environment** of the uses to which the leased lands will be subject. (Emphasis added).

Appendix D.
Davis v. Morton
District Court Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
No. 9190 CIVIL

ABEL DAVIS, ELIOT PORTER, SANTA FE AREA DEFENSE FUND, INC., (a nonprofit New Mexico corporation), CENTRAL CLEARING HOUSE, INC., (a nonprofit New Mexico corporation), Plaintiffs,

vs.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, LEWIS R. BRUCE, COMMISSIONER OF THE INDIAN AFFAIRS IN THE DEPARTMENT OF THE INTERIOR, and WALTER O. OLSON, AREA SUPERVISOR OF THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF THE INTERIOR, Defendants.

JUDGMENT

This matter coming on for the entry of judgment pursuant to the opinion and mandate of the Tenth Circuit Court of Appeals, and the parties having been afforded an opportunity to present their views relative to the form of judgment; Now, Therefore,

IT IS BY THE COURT ORDERED AND ADJUDGED:

(1) It is declared that the approval by the Secretary of the Interior and his subordinates on April 17, 1970, of the 99 year lease of restricted land from the Pueblo of Tesuque as lessor to Sangre de Cristo Development Company, Inc., and the subsequent approval of the master plan and architect's design of certain lands therein by the defendants were irregular and not in compliance with the National Environmental Policy Act of 1969;

(2) Before the defendants or any of them take any further actioin with respect to the above described lease or the development of Tracts 1, 2, 3, 4 or 5 thereof they are ORDERED and required to prepare a detailed statement on the environmental impact of the Colonias de Santa Fe development, giving full consideration to alternatives to the

proposed development; and to otherwise bring their decisionmaking and planning activities into compliance with the National Environmental Policy Act and the orders and guidelines issued pursuant thereto;

(3) The defendants and each of them are enjoined from approving, allowing, or action on, in any way, any submissions or approvals required or permitted under the lease agreement referred to in paragraph 1 above until such time as the environmental impact of the project has been studied and evaluated as required by the Environmental Policy Act of 1969, the orders and guidelines issued thereunder;

(4) The defendants and each of them are ORDERED and required to take all steps necessary to effect a suspension until such time as the environmental impact of the project has been studied and evaluated as required by the National Environmental Policy Act of 1969, the orders and guidelines issued thereunder;

(5) IT IS FURTHER ORDERED that the plaintiffs recover their costs.

/s/ Howard Bratton
UNITED STATES DISTRICT JUDGE

Appendix E.
U.S. v. Ahtanum Irrigation District

United States v. Ahtanum Irrigation District, 236 F. Supp. 321 (9th Cir. 1956), supra, p. involved a contract entered into by the Department of the Interior in which 75 percent of the waters of Ahtanum Creek were granted to non-Indian settlers and 25 percent reserved to the Indians. This Court commented as follows:

> Viewing this contract as an improvident disposal of three-fourths of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the government's dealing with the Indians and the Indian tribes. That history supports the statement: "From the very beginnings of this nation the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians."
>
> The numerous sanctimonious expressions to be found in the Acts of Congress, the statements of public officials, the opinions of courts respecting "the generous and protective spirit which the United States properly feels toward its Indian wards," and the " 'high standards for fair dealing' required of the United States in controlling Indian affairs," are but demonstrations of a gross national hypocrisy. 236 F. 2d at 337-338 [footnote and citations omitted].

Appendix F.
Constitutional, Statutory, and Regulatory Provisions

1. The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Administratrive Procedure Act, 5 U.S.C. SS 701-706, states in pertinent part:

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the

final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, an conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

4. Relevant statutes in Title 25 (Indians) of the United States Code state:

§ 1. Commissioner of Indian Affairs

There shall be in the Department of the Interior a

Commissioner of Indian Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate.

§ 1a. Delegation of powers and duties by Secretary of Interior and Commissioner of Indian Affairs

For the purpose of facilitating and simplifying the administration of the laws governing Indian affairs, the Secretary of the Interior is authorized to delegate, from time to time, and to the extent and under such regulations as he deems proper, his powers and duties under said laws to the Commissioner of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law. Subject to the supervision and direction of the Secretary, the Commissioner is authorized to delegate, in like manner, any powers and duties so delegated to him by the Secretary, or vested in him by law, to the assistant commissioners, or the officer in charge of any branch, division, office, or agency of the Bureau of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior or the Commissioner of Indian Affairs pursuant to law. Such delegated powers shall be exercised subject to appeal to the Secretary, under regulations to be prescribed by him, or, as from time to time determined by him, to the Under Secretary or to an Assistant Secretary of the Department of the Interior, or to the Commissioner of Indian Affairs. The Secretary or the Commissioner, as the case may be, may at any time revoke the whole or any part of a delegation made pursuant to this section, but no such revocation shall be given retroactive effect. Nothing in this section shall be deemed to abrogate or curtail any authority to make delegations conferred by any other provision of law, nor shall anything in this section be deemed to convey authority to delegate any power to issue regulations.

§ 2. Duties of Commissioner

The Commissioner of Indian Affairs shall, under the

direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

§ 2a. Assistant or deputy commissioners; appointment; powers and duties

Assistant or deputy commissioners of the Bureau of Indian Affairs, in the Department of the Interior, shall be appointed by the Secretary of the Interior, subject to civil-service laws and the Classification Act of 1949. Appointments to these positions shall be considered as made under the authority of Section 43 of Title 5. Assistant and deputy commissioners so appointed shall be authorized to sign such letters, papers, and documents and to perform such other duties as may be directed by the Commissioner of the Bureau of Indian Affairs. The Secretary may designate for the Bureau of Indian Affairs an assistant or deputy commissioner, who shall be authorized to perform the duties of the Commissioner in case of the death, resignation, absence, or sickness of the Commissioner.

§ 9. Regulations by President

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this sectioin shall be null and void, and all money or the thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owner, with the approval of the Secretary of the Interior for public, religious, educational, recreational, residential, or business

purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be

subject.

§ 621. Portions of tribal lands to be held in trust by the United States; remainder to become part of the public domain

Title to the lands and the improvements thereon, lying and situated within the State of New Mexico, which have been acquired by the United States under authority of title II of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 200), the Emergency Relief Appropriation Act of April 8, 1935 (49 Stat. 115), Section 55 of title I of the act of August 24, 1935 (49 Stat. 750, 781), the Bankhead-Jones Farm Tenant Act (50 Stat. 522, 525) and subsequent emergency relief appropriation Acts administrative jurisdiction over which was heretofore been transferred by the President from the Secretary of Agriculture to the Secretary of the Interior to be administered through the Commissioner of Indian Affairs for the benefit of the Indians, by Executive Orders Numbered 7792, 7975, 8255, 8471, 8696, and 8472 and that title to the public domain lands and improvements thereon, lying and situated within the State of New Mexico, which were withdrawn in aid of proposed legislation by the Secretary of the Interior on December 23, 1938, and May 31, 1939, and now in use by Pueblo or Canoncito Navajo Indians, excepting those portions thereof used by the United States for administrative purposes, is declared to be in the United States of America in trust for the respective tribes, bands, or groups of Indians occupying and using same as a part of their respective existing reservations, subject to valid existing rights. The remainder of the aforesaid land is declared to be a part of the public domain of the United States and shall be transferred by the Secretary of the Interior to the Bureau of Land Management for administration under the provisions of the Act of Congress of June 28, 1934, generally known as the Taylor Grazing Act (48 Stat. 1269, as amended). The boundaries and descriptions of the areas to become Indian lands and those which are to be transferred to the Bureau of Land Management are set out in Sections III and IV, respectively, of the memorandum of information which is

attached to and a part of the report of the Secretary of the Interior to the Senate Committee on Interior and Insular Affairs on Sections 621-623 of this title, and such boundaries and descriptions are adopted as part of said sections and shall be published in the Federal Register: **Provided**, That before said boundaries and descriptions are published in the Federal Register as provided in this section, the Secretary of the Interior may correct any clerical errors in Section III of said memorandum of information and shall revise the same so as to define the areas on that portion of the lands conveyed by sections 621-623 of this title and known as Bell Rock Mesa used and occupied respectively by the Laguna Pueblo Indians and the Canoncito Navajo Indians.

5. 28 U.S.C Rule 19 states:

Rule 19. Joinder of persons Needed for Just Adjudication

[a] Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

[b] Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity or good conscience the action should proceed among the parties before it, or should be

dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for joinder.

[c] **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

[d] **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

6. Pertinent portions of the National Environmental Policy Act of 1969 (NEPA) state:

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in

planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action.

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action.

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(d) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of

available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

7. N.M. Stat. Ann. 40A-8-1 (1953), Public nuisance, states: "A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either:

A. injurious to public health, safety, morals or welfare; or

B. interferes with the exercise and enjoyment of public rights, including the right to use public property.

Whoever commits a public nuisance for which the act or penalty is not otherwise prescribed by law is guilty of a petty misdemeanor."

8. The Advisory Committee Note to Amended Rule 19, 28 U.S.C. Rule 19, states in pertinent part:

Subdivision (b).—When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See Ross v. Texas Co. 23 F. 2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S.

77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the deciding cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. A.L. Smith Iron Co. v. Dickson, 141 F. 2d 3 (2d Cir. 1944); Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258 (S.D. N.Y. 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. Ward v. Deavers, 203 F. 2d 72 (D.C. Cir. 1953); Miller & Lux, Inc. v. Nickel, 141 F. Supp. 41 (N.D. Calif. 1956). On the use of "protective provisions," see Roos v. Texas Co., supra; Atwood v. Rhode Island Hosp. Trust Co., 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. Stumpf v. Fidelity Gas Co., 294 F. 2d 886 (9th Cir. 1961); and the general statement in National Licorice Co. v. Labor Board, 309 U.S. 350, 36.3 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See Hudson v. Newell, 172 F. 2d 848, 852 mod., 176 F. 2d 546 (5th Cir. 1949); Gauss v. Kirk, 198 F. 2d 83, 86 (D.C. Cir. 1952); Abel v. Brayton Flying Service, Inc., 248 F. 2d 713, 716 (5th Cir. 1957) (suggestion of possibility of

counter-claim under Rule 13 (h); cf. Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F. 2d 976 (2d Cir. 1939), cert. denied, 308 U.S. 597 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See Developments in the Law, supra. 71 Harv. L. Rev. at 882; Annot., Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship, 134 A.L.R. 335 (1941); Johnson v. Middleton, 175 F. 2d 535 (7th Cir. 1949); Kentucky Nat. Gas Corp. v. Duggins, 165 F. 2d 1011 (6th Cir. 1948); McComb v. McCormack, 159 F. 2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee (for the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. Kroese v. General Steel Castings Corp., 179 F. 2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See Fitzgerald v. Haynes, 241 F. 2d 417, 420 (3d Cir. 1957); Fouke v. Schenewerk, 197 F. 2d 234, 236 (5th Cir. 1952); cf. Warfield v. Marks, 190 F. 2d 178 (5th Cir. 1951).

§ 131.5 Special requirements and provisions.

(a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

(b) Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair

annual rental.

(1) An adult Indian owner of trust or restricted land may lease his land for religious, educational, recreational or other public purposes to religious organizations or to agencies of the Federal, State or local government at a nominal rental. Such adult Indian may lease land to members of his immediate family with or without rental consideration. For purposes of this section, "immediate family" is defined as the Indian's spouse, brothers, sisters, lineal ancestors, or descendants.

(2) In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of Federal, State, or local governments; for purposes of subsidization for the benefit of the tribe; and for homesite purposes to tribal members provided the land is not commercial or industrial in character.

(3) Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners.

(c) Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

(d) The lessee may be required to provide insurance in an amount adequate to protect any improvements on the leased premises; the lessee may also be required to furnish the appropriate liability insurance, and such other insurance as may be necessary to protect the lessor's interest.

(e) No lease shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part. No lease shall be entered into more than 12 months prior to the commencement of the term of the lease. Except with the approval of the Secretary no lease shall provide for payment of rent in advance of the beginning of the annual use period for which such rent is paid. The lease contract shall contain provisions as to the dates rents shall become due and payable.

(f) Leases granted or approved under this part shall contain provisions as to whether payment of rentals is to be made direct to the owner of the land or his representative or to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(g) All leases issued under this part shall contain the following provisions:

(1) While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of his sureties, are to the United States as well as to the owner of the land.

(2) Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified of any such change in the status of the land.

(3) The lessee agrees that he will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

(h) Leases granted or approved under this part on individually owned lands which provide for payment of rental direct to the owner or his representative shall contain the following provisions:

(1) In the event of the death of the owner during the term of this lease and while the leased premises are in trust or restricted status, all rentals remaining due or payable to the

decedent or his representative under the provisions of the lease shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(2) While the leased premises are in trust or restricted status, the Secretary may in his discretion suspend the direct rental payment provisions of this lease in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

§ 131.6 Negotiation of leases.

(a) Leases of individually owned land or tribal land may be negotiated by those owners or their representatives who may execute leases pursuant to § 131.3.

(b) Where the owners of a majority interest, or their representatives, who may grant leases under § 131.3, have negotiated a lease satisfactory to the Secretary he may join in the execution of the lease and thereby commit the interests of those persons in whose behalf he is authorized to grant leases under § 131.2 (a) (1), (2), (3), and (5).

(c) Where the Secretary may grant leases under § 131.2 he may negotiate leases when in his judgment the fair annual rental can thus be obtained.

§ 131.7 Advertisement.

Except as otherwise provided in this part, prior to granting a lease or permit as authorized under § 131.2 the Secretary shall advertise the land for lease. Advertisements will call for sealed bids and will not offer preference rights.